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 24 FUNDS MANAGEMENT, LLC, WELLS FARGO
 25 FUNDS TRUST, WELLS FARGO FUNDS
 26 DISTRIBUTOR, LLC, STEPHENS, INC., and
 27 WELLS FARGO BANK, N.A.

28
 16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 SAN FRANCISCO DIVISION

20 ARNOLD KREEK, Individually And On Behalf
 21 Of All Others Similarly Situated,

22 Plaintiffs,

23 v.

24 WELLS FARGO & COMPANY, WELLS
 25 FARGO FUNDS MANAGEMENT, LLC,
 26 WELLS FARGO FUNDS TRUST, WELLS
 27 FARGO DISTRIBUTORS, STEPHENS, INC.,
 WELLS FARGO BANK, N.A.,

Defendants.

No. CV-08-1830 WHA

Action Filed: April 4, 2008

**DEFENDANTS' SUBMISSION RE
 EDWARD LEE'S MOTION TO BE
 APPOINTED LEAD PLAINTIFF**

1 In its Order dated June 30, 2008, the Court directed “defense counsel to attend the hearing on
 2 lead plaintiff selection” and to “be prepared to address the accuracy of the methodology used by
 3 candidates to assess their damages claims.” Dkt. 28 at 1:28-2:2. At yesterday’s hearing on Edward
 4 Lee’s motion to be appointed lead plaintiff, defense counsel therefore identified for the Court an
 5 apparent discrepancy between the near *doubling* in value of the share price of the Wells Fargo
 6 Advantage Specialized Tech Fund Class A (WFSTX) during the period when Mr. Lee held shares in
 7 that fund, and what Mr. Lee characterized in his response to the Court-ordered questionnaire as a
 8 *loss* on the sale of those same shares of \$1,185.41. Dkt. 31 at 4:22-26. The Court directed defense
 9 counsel to file a submission on this point. Dkt. 35.

10 **Background:** In his response to the Court-ordered questionnaire, Mr. Lee represented that he
 11 purchased 1,065.897 shares of the Specialized Tech Fund on June 6, 2003 at a share price of \$3.40
 12 for a total cost of \$3,624.05. Dkt. 31 at 4:22. Mr. Lee also represented that he sold 1,065.897
 13 shares—that is, all of his shares—in the Specialized Tech Fund on July 6, 2007, and that the
 14 “proceeds from [the] sale” totaled \$7,066.90. *Id.* at 4:25. Although Mr. Lee does not in his
 15 response set forth the share price at which he sold his position in the Specialized Tech Fund,
 16 according to Yahoo! Finance it was \$6.63. Declaration Of Jeremy Kamras In Support Of
 17 Defendants’ Submission Re Edward Lee’s Motion To Be Appointed Lead Plaintiff (“Kamras
 18 Decl.”) Ex. A at 1.¹ Multiplied by the number of shares Mr. Lee sold, this does in fact equal
 19 \$7,066.90. Therefore, Mr. Lee purchased his shares for \$3,624.05, and sold them for \$7,066.90,
 20 thereby profiting \$3,442.85—a *95 percent return* on his investment (about 23% per year).
 21 Inexplicably, however, Mr. Lee claims a *loss* of \$1,185.41 on this transaction. Dkt. 31 at 4:26.

22 **Inadequate Explanation:** In communications between counsel before the hearing, Mr. Reese
 23 sought to explain the discrepancy as a result of an “average cost basis” in the amount of \$8,252.31
 24 caused by *reinvestment of dividends*. Kamras Decl. Ex. B (“The average cost basis of a mutual fund

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 26 ¹Defendants request that, pursuant to Federal Rule of Evidence 201, the Court take judicial
 27 notice of the Yahoo! Finance quotes for the share price of the Specialized Tech Fund Class A. See
 28 *Siemers v. Wells Fargo & Co.*, No. 05-04158, 2007 WL 1456047, at *2 (N.D. Cal. May 17, 2007)
 (Alsup, J.) (taking judicial notice of Yahoo! Finance quotes for other Wells Fargo mutual funds).

1 is often more than the purchase price because it includes capital gain distributions," which "are often
 2 reinvested, thereby changing the average cost basis"). That could not be the case. A reinvestment
 3 of dividends would result in the purchase of additional shares in the fund. But according to
 4 Mr. Lee's written submission to the Court, he purchased 1,065.897 shares of the Specialized Tech
 5 Fund and then later sold *precisely the same amount*, which Mr. Lee himself characterized as "all
 6 shares." Dkt. 31 at 4:22-24. He therefore did not reinvest or otherwise acquire additional shares at a
 7 cost (or basis) different from that at which he purchased the original (and only) 1,065.897 shares.

8 Following the hearing, Mr. Reese showed defense counsel a document that he represented to
 9 have been produced by Charles Schwab, the broker through which Mr. Lee is said to have acquired
 10 his shares in the Specialized Tech Fund. The document lists a figure of approximately \$8,200, but it
 11 was unclear where this number came from or how it related to the single purchase and single sale of
 12 the fund in question. Neither Mr. Lee nor Mr. Reese were able to adequately explain the derivation
 13 of this figure. Mr. Lee claimed that the figure was generated for tax purposes, but could not
 14 otherwise explain its origin. Mr. Reese asserted that the figure is the average cost basis. But the use
 15 of an "average cost basis" typically requires the purchase of shares at different times and different
 16 prices. According to the Internal Revenue Service, "[i]n order to figure your gain or loss using an
 17 average basis, ***you must have acquired the shares at various times and prices*** and have left them on
 18 deposit in an account handled by a custodian or agent who maintains an account for the acquisition
 19 or redemption of these shares." *Frequently Asked Tax Questions and Answers: How do I calculate*
 20 *the average basis for the sale of mutual fund shares?* (emphasis added), available at
 21 <http://www.irs.gov/faqs/faq-kw123.html>. Here, there were no additional shares purchased.

22 Earlier today, Mr. Reese sent a letter to defense counsel in which he again sought to explain
 23 the derivation of the average cost basis figure listed in the Schwab document. Kamras Decl. Ex. C.
 24 Unlike his earlier email, however, Mr. Reese no longer claimed that the increased cost basis resulted
 25 from the reinvestment of dividends. Rather, he asserted (without citation to any authority) that
 26 "[c]alculating the Average Cost Basis . . . involves a myriad of inputs, including, but not limited to,
 27 sales charges and redemption fees paid by the investor," and "it does not necessarily change the
 28 number of shares purchased or sold . . ." *Id.* at 1-2. A hypothetical followed purporting to

1 demonstrate that these kind of fees could increase the cost basis. *Id.* at 2.

2 But, even if theoretically correct, Mr. Reese's new explanation goes no further than to
 3 *hypothesize* how Mr. Lee's average cost basis *might* have been calculated—he does not say how
 4 Mr. Lee's average cost basis in fact was calculated. More importantly, the hypothetical by which
 5 Mr. Reese seeks to demonstrate how sales charges and redemption fees can impact a mutual fund's
 6 cost basis reflects an increase in cost basis of *only 7.1 percent* (from \$100.00 to \$107.10). Here,
 7 however, Mr. Lee has represented to the Court a "cost basis" that is said *to have increased by 127.7*
 8 *percent* (from \$3,624.05 to \$8,252.31) from the actual purchase price. It is absolutely inconceivable
 9 that sales charges and redemption fees could *more than double* the cost of a mutual fund. Not
 10 surprisingly, neither Mr. Reese nor Mr. Lee have supplied actual data to support this absurd
 11 contention.

12 **Significance:** The significance of the discrepancy bears on Mr. Lee's adequacy to serve as
 13 Lead Plaintiff not only because diligence and credibility are important, but also because two of the
 14 claims in the current version of the *Kreek* complaint are based on Section 12(a)(2) of the Securities
 15 Act. *See* Dkt. 1 at 20:22-23:22. As the Court held in the related *Siemers* Action, "[t]his order finds
 16 that pursuant to [*In re Broderbund/Learning Co. Sec. Litig.*, 294 F.3d 1201 (9th Cir. 2002)], where,
 17 as here, the undisputed facts show that plaintiff has profited from the transactions at issue, such
 18 allegations cannot constitute a Section 12(a)(2) claim for damages.... The same is true for
 19 securities currently held that could be sold at their present value for a profit." *Siemers*, 2007 WL
 20 1456047, at *4. Whether Mr. Lee lost money, or as the case in fact appears to be, greatly profited,
 21 from the sale of his shares in the Specialized Tech Fund is therefore significant.

22 **Conclusion:** It's as simple as this: If you buy 1,065.897 shares in a fund for \$3,624.05 and
 23 you then sell 1,065.897 shares in the same fund for \$7,066.90, you have made a profit—a big profit.

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1 Characterizing the transaction as a loss is problematical and deserves a cogent and credible
2 explanation, which we have not seen. Instead, we have seen non-credible, nonsensical attempts to
3 explain the representations by Mr. Lee without any actual data.

4

5 DATED: August 8, 2008

6 Respectfully,

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13 By: _____ /s/
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